BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

WILLIAM WHITE, Claimant, v. COEUR D' ALENE MINES CORP., Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	)	**IC 2005-001863** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed August 2, 2007

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor. Claimant is represented by Starr Kelso of Coeur d'Alene. H. James Magnuson, also of Coeur d'Alene, represents Employer/Surety. In lieu of a hearing, the parties submitted a Stipulation of Facts on March 5, 2007. The parties then submitted post-hearing briefs and this matter came under advisement on April 12, 2007, and is now ready for decision.

ISSUE

As stipulated to by the parties, the sole issue to be decided is whether Claimant's claim for Workers' Compensation benefits is barred by Idaho Code § 72-701.

CONTENTIONS OF THE PARTIES

Claimant contends that he gave timely notice of his accident to Employer even though that notice came approximately six months after the "incident" that was ultimately found by

medical evidence to have produced Claimant's injury. Until Claimant became aware that he had suffered an "accident" causing an "injury," there was nothing to report. Once he was informed by his physician that his rotator cuff tears were the result of his "accident," he informed his employer promptly.

Defendants contend that Claimant's notice is untimely because his "accident" occurred six months days prior to Employer receiving notice of the same and was clearly beyond the 60-day notice requirement contained within Idaho Code § 72-701 and, thus, his claim must fail.

STIPULATION OF FACTS

The parties submitted the following Stipulation of Facts, which is adopted by the Referee:

1. Beginning in approximately 1999 Claimant White began "hurting allover". He underwent various testing, including blood testing that was abnormal, and was informed that he had lupus erythematosus. He then began feeling better but, in early 2002, he had the onset of pain that involved the ankles, feet, elbows and low back in somewhat of a migratory pattern that didn't relate to activity.

2. Claimant White saw Dr. Terrance Tisdale in March 2002 for his pain.

3. Claimant White works in an underground mine at 5500 foot level with the temperature fairly constant at 98 degrees Fahrenheit.

4. Upon exam by Dr. Tisdale on March 28, 2002, Claimant White's neck and shoulders appeared normal. He had pain over the lateral epecondyles, pain on stressing the common extensor tendon, and pain on range of motion. His low back hurt in extension and lateral bending and his ankles were painful. Dr. Tisdale's diagnosis was lupus erythematosus (active) and bilateral epecondylitis in his elbows. An appointment was made with Dr. Sakai, a rheumatologist.

5. Dr. Sakai saw Claimant White on July 11, 2002. He was complaining of pain in his arms, shoulders, knees, and feet. He had morning stiffness and a gelling phenomenon. His hands, for 4-5 years, had been going to sleep. He was thought to have convincing evidence of Raynaud's phenomenon and a questionable history of lupus. He was tried on Vioxx, Celebrex, and diclofenac for the musculoskeletal pain.

6. On 8/9/02 Claimant White was seen by Dr. Sakai again. He was complaining of musculoskeletal aches and pain in the right shoulder, right elbow, knees and feet, without x-ray finding support. Diagnosis was possible Raynaud's phenomenon, probable osteoarthritis, and maybe some degenerative arthritis in his neck and shoulders made worse by his occupation as a miner. He was continued on Vioxx and with a trial of Neurontin. Possible MRI of spine. On 8/20/02, after complaints of stomach and back pain, he stopped Vioxx.

7. X-rays taken of Claimant White's shoulder on 8/9/02 revealed a normal relationship of the humeral head to the glenoid fossa. The AC joint appeared normal and there were no erosions or soft tissue calcifications. The impression was normal shoulders bilaterally.

8. An exam on 9/4/02 found that there was normal range of motion in the shoulders bilaterally and the bilateral films were unremarkable except for down-sloping acromion bilaterally. The diagnosis was musculoskeletal complaints due to rotator cuff tendinitis affecting the shoulder, degenerative disc disease and degenerative joint disease affecting the cervical and lumbar spine. Claimant White did not see Dr. Sakai again until June of 2004.

9. In the spring of 2003, Claimant White, while pulling heavy timber, rock drills and bags of dynamite up a 50 foot hole with a rope, by hand, felt that his bilateral shoulder pain increased.

10. On June 6, 2004 a rock burst caused White's drill steel to become pinched in the

rock. He yanked on the steel in an effort to free it, and upon yanking on the steel he felt a worsening of his bilateral shoulder pain.

11. On June 10, 2004 Claimant White was again seen by Dr. Sakai. She notes that Claimant White's shoulders started to worsen while working on the steel, and that his right shoulder now pops and is painful. On exam, his lower back was also painful, as were his knees. Dr. Sakai sent him to physical therapy for range of motion exercises and rotator cuff strengthening exercises. X-rays at that time found cervical spine and lumbar spine degenerative disc disease and degenerative joint disease for which he was also sent to physical therapy.

12. After three months of rotator cuff strengthening exercises Claimant White returned to see Dr. Sakai on September 24, 2004. He had not received any significant improvement in the bilateral shoulder pain, and he was beginning to develop shoulder instability. Bilateral MR arthrograms were requested by Dr. Sakai. The MR arthrogram of the left shoulder performed on October 1, 2004 showed a partial thickness undersurface tear of the distal supraspinatus tendon, moderate acromioclavicular joint arthropathy with mild impingement on the underlying supraspinatus musculotendinous junction. The MR arthrogram of this right shoulder performed on October 5, 2004 revealed a complete tear of the anterior and middle portions of the supraspinatus tendon. Because of these findings Dr. Sakai referred Claimant White to Dr. Olscamp, a board certified orthopedic surgeon.

13. On November 11,2004 Claimant White was seen by Dr. Olscamp and Nat Biondi, P.A. Dr. Olscamp opined that Mr. White's rotator cuff tears were caused by his activity as a jack leg operator, yanking on the drill steel, approximately six months earlier.

14. That Claimant White suffered a specific incident on June 10, 2004 while yanking on his stuck drill steel. White who had been treating with Dr. Sakai, a

rheumatologist, for degenerative arthritis in his neck and shoulder was not aware that he had suffered violence to the physical structure of his body as a result of the June 10, 2004 incident, until he was told so by Dr. Olscamp on November 11,2004.

15. On November 15 Claimant White advised his employer of an injury to his shoulder.

16. This Stipulation of Facts only relates to the issue presented for determination that is set forth below. It is not intended to be binding on any other issue that may arise during the course of this proceeding.

DISCUSSION AND FURTHER FINDINGS

17. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). However, the Commission is not required to construe facts liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

18. **Notice.** Claimant presents cogent argument that his June 6, 2004, "incident" was not an "accident" that needed to be reported because an "accident" is defined as an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury. Idaho Code § 72-102(17)(b). An injury is defined as a personal injury caused by an accident arising out of and in the course of employment. An injury is construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. Idaho Code § 72-102(17)(a).

19. Claimant's argument continues that because he already was suffering from shoulder

pain at the time of the June 6, 2004, event, and continued to suffer increasing shoulder pain thereafter, he was unaware that the June "incident" caused an "injury," i.e., violence to the physical structure of his body. It was not until he sought medical attention from Dr. Olscamp on November 11, 2004, that Claimant was advised his rotator cuff tears were caused by his yanking on the drill steel approximately six months earlier. Claimant further argues that since the onset of pain at work does not constitute an accident, Konvalinka v. Bonneville County, 140 Idaho 477, 95 P.3d 628 (2004); and because a claimant must prove by expert medical evidence that his or her injury was caused by an industrial accident, Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 890 P.2d 732 (1995), the 60-day notice period prescribed by Idaho Code § 72-701 should begin when a physician informs the worker that the injury was the result of an on the job incident and the worker thus becomes aware that he suffered an "accident" as statutorily defined. Claimant thus asserts his notice is timely because he reported his incident and injury four days after he learned from his physician that he had suffered an "accident" on June 6, 2004.

20. Defendants argue that according to the wording of Idaho Code § 72-701, Claimant has failed to give timely notice of his accident and Employer did not have actual or constructive knowledge of the same. Further, Claimant has failed to prove that Employer and its surety have not been prejudiced by the delay in giving notice. Defendants assert Claimant's yanking on the drill steel in June 2004 produced pain and the incident should have been timely reported so that Employer would have had an opportunity to send Claimant for medical treatment.

21. Idaho Code § 72-701 provides in pertinent part:

> No proceedings under this law shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable but not later than sixty (60) days after the happening thereof, and unless a claim for compensation with respect thereto shall have been made within one (1) year after the date of the accident . . . .

The Idaho Supreme Court has held that the notice must be sufficient to apprise the employer of any accident arising out of and in the course of employment causing the personal injury. Murray-Donahue v. National Car Rental Licensee Association, 127 Idaho 337, 339, 900 P.2d 1348, 1350 (1995).

22. Several instructive decisions have addressed the time at which the one year limitations period for filing a claim commences under Idaho Code § 72-701. In Smith v. IML Freight, Inc., 101 Idaho 600, 619 P.2d 118 (1980), Smith fell while at work. He experienced pain and consulted physicians who diagnosed his condition as osteoarthritis unrelated to his work. Smith did not file a written notice of injury nor a claim for benefits within one year of his fall. Nearly two years later, Smith was found to have suffered a herniated disk as a result of his fall. The Court chose not to address the notice issue, but found that Idaho Code § 72-701 barred Smith's untimely claim stating:

> The appellant contends the Commission erred in denying his claim because due to the fact that his condition was initially diagnosed by both doctors as osteoarthritis and treated accordingly, he did not know he had a compensable claim until long past the time for filing his claim. It was not until May 2, 1977, almost two years after the accident, that the problem was diagnosed as a herniated disc, requiring surgery. Surgery was performed on May 4, 1977. He filed his claim immediately after the surgery.
> ….
>
> Appellant also argues that the term 'accident' must be given a broader interpretation to allow the filing of a claim within the statutory period following discovery of the results of the accident, as has been done in other jurisdictions. [Citations omitted.] However, this argument has been presented to and rejected by this court in earlier cases: Moody v. State Highway Department, 56 Idaho 21, 48 P.2d 1108 (1935); Atwood v. State of Idaho Department of Agriculture, 80 Idaho 349, 330 P.2d 325 (1958); Gregg v. Orr, 92 Idaho 30, 436 P.2d 245 (1968); Cummings v. J.R. Simplot, 95 Idaho 465, 511 P.2d 282 (1973).
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> Prior to 1927, Idaho utilized the time of the injury as the time for commencing the running of the statute of limitations. 'No proceedings under this chapter for compensation shall be maintained unless . . . a claim for compensation with respect to such injury shall have been made within one year after the date of the injury . . ..' § 6243 Comp. Stat. 1919.

> In 1927 the legislature amended this statute by changing only the word 'injury' to 'accident.' 1927 Sess. Laws, Ch. 106 § 9, p. 143. The court in Moody v. State Highway Department, supra 56 Idaho at 25-26, 48 P.2d at 1110 (1935), discussed this change and held that since the legislature had amended the section by changing only the one word, the intent was clearly to commence the limitation period from the date of accident not from the manifestation of a compensable injury. 'Where the language of a statute is unambiguous, this court is powerless to intervene and grant relief.' The court was aware of the hardship this presented, saying: 'The statute, as amended, works a hardship upon all workers who suffer an accident arising out of and in the course of their employment, whose compensable injuries do not become manifest until after the period prescribed . . . has passed, as is most emphatically emphasized by the unfortunate situation of the respondent in the case at bar, but the remedy is with the Legislature.' Moody, 56 Idaho at 26, 48 P.2d at 1110.

Smith, 101 Idaho at 603-604, 619 P.2d at 121-122.

23. More recently in Petry v. Spaulding Drywall, 117 Idaho 382, 788 P.2d 197 (1990), the Court again considered the time when the limitations period of Idaho Code § 72-701 begins to run for purposes of filing a claim:

> Petry's claim for Worker's Compensation benefits is barred by his failure to comply with I.C. § 72-701, which provides in part that "[n]o proceedings under this law shall be maintained unless ... a claim for compensation with respect thereto shall have been made within one (1) year after the date of the accident...." The one year statute of limitations is measured from the date of the accident, and not from the date that the injury is discovered or its severity understood. Moody v. State Highway Department, 56 Idaho 21, 48 P.2d 1108 (1935); Smith v. IML Freight, Inc., 101 Idaho 600, 619 P.2d 118 (1980).
>
> In this case, a Notice of Injury and Claim for Benefits was not filed until February of 1987, approximately 18 months after the accident. Petry argues that it is unjust to require an injured worker to file a claim within the statutory time limit where the extent of the injury is not discovered until after the time has expired; especially, as in this case, where the employer had actual notice of the injury at the time it occurred and is not prejudiced by the delay.
>
> This argument is compelling to the conscience, but this Court is constrained by the clear words of the statute. Aristotle said that, "equity is that idea of justice which contravenes the written law." This Court is not free to impart equity where, as in the case of Worker's Compensation, the law in question derives its existence solely from the printed words of the statutes.

> In Moody v. State Highway Dep't, supra, this Court noted that in 1927 the legislature amended I.C. § 43-1202, the predecessor to I.C. § 72-701, by changing a single word; instead of measuring the one year time limit from the date of the "injury," the amended statute measured the time limit from the date of the "accident."
>
> We have no doubt that when the legislature substituted the word "accident" for the word "injury," it intended to change the date from which the time for making claim should commence to run, and to change that date from the first manifestation of a compensable injury to the date of the accident. …. Moody, 56 Idaho at 26, 48 P.2d 1108 (citations omitted).
>
> Although the result is harsh and arbitrary, it is for the legislature to re-examine its policies, and not for this Court to fabricate new laws where explicit statutory directives already exist.

Petry, 117 Idaho at 384-385, 788 P.2d at 199-200.

24. The express language of Idaho Code § 72-701 requires that the one-year limitation period for the filing of a claim commences with an accident—exactly the same event from which the 60-day limitation period for the giving of notice begins to run. It follows that for purposes of the notice limitation period, an accident occurs at the time of the event causing injury regardless of whether the claimant is aware of the injury caused thereby. The 60-day notice period is measured from the date of the accident, and not from the date that the injury is discovered or its severity understood.

25. It is indeed unfortunate that Claimant herein was injured June 6, 2004, but apparently did not know he had a claim requiring notice until he was so informed by a physician on November 11, 2004, well after the 60-day notice period had run. The inequity of requiring Claimant to give notice of a condition he was unaware existed is self-evident, and contrary to the stated purpose of the workers' compensation law to provide "sure and certain relief" for injured workers, their families, and dependants, as stated in Idaho Code § 72-201. As set forth in Idaho Code §§ 72-448 and 72-102(19), the legislature has resolved this same inequitable dilemma for

those suffering occupational diseases, but has not chosen to do so for those suffering industrial accidents.

26. Claimant herein has failed to give timely notice of his June 6, 2004, accident and his claim is barred by Idaho Code § 72-701, unless he satisfies the provisions of Idaho Code § 72-704.

27. **Knowledge or prejudice.** Idaho Code § 72-704 provides in pertinent part:

> A notice given under the provisions of section 72-701 or section 72-448, Idaho Code, shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place, nature or cause of the injury, or disease, or otherwise, unless it is shown by the employer that he was in fact prejudiced thereby. Want of notice or delay in giving notice shall not be a bar to proceedings under this law if it is shown that the employer, his agent or representative had knowledge of the injury or occupational disease or that the employer has not been prejudiced by such delay or want of notice.

28. The parties herein stipulated that Claimant gave notice to his Employer on November 15, 2004, well after the 60-day notice period had run. The stipulated facts do not reveal whether Employer did or did not have actual or constructive knowledge that Claimant suffered an accident within 60 days of June 6, 2004. Claimant relies upon his arguments regarding Idaho Code § 72-701 and thus asserts that lack of prejudice is not an issue in this case. Defendants argue that Claimant has failed to prove that Employer and its surety have not been prejudiced by the delay in giving notice. Had Claimant's accident been timely reported, Employer would have had an opportunity to send Claimant for medical treatment.

29. The Court in Jackson v. JST Manufacturing, 142 Idaho 836, 136 P.3d 307 (2006), observed that Idaho Code § 72-704 gives the employer a favorable presumption and it is a claimant's burden to affirmatively prove that the employer was not prejudiced by lack of timely notice. In the present case, the stipulated facts may not show that Defendants were prejudiced by lack of timely notice, however, the facts do not affirmatively show that Defendants were not

prejudiced. Similarly, the stipulated facts do no prove that Defendants had actual or constructive knowledge of the accident at any time prior to November 15, 2004—well after the 60-day period had run.

30. Claimant has not proven that the bar to his claim arising from Idaho Code §72-701 is averted by satisfaction of Idaho Code § 72-704.

CONCLUSIONS OF LAW

1. Claimant did not give timely notice of his accident and his claim is barred pursuant to Idaho Code § 72-701.

2. Claimant has failed to prove that the bar to his claim posed by Idaho Code § 72-701 is averted by satisfaction of Idaho Code § 72-704.

3. Claimant's claim should be dismissed.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusion of Law, the Referee recommends that the Commission adopt such findings and conclusion as its own and issue an appropriate final order.

DATED this 27th day of July 2007.

INDUSTRIAL COMMISSION

_____/s/_____
Alan Reed Taylor, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of August, 2007, a true and correct copy of **Findings of Fact, Conclusion of Law, and Recommendation** was served by regular United States Mail upon each of the following:

STARR KELSO
P O BOX 1312
COEUR D ALENE ID 83816

H JAMES MAGNUSON
P O BOX 2288
COEUR D'ALENE ID 83814

lbs _____/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

WILLIAM WHITE, Claimant, v. COEUR D' ALENE MINES CORP., Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	)	**IC 2005-001863** **ORDER** Filed August 2, 2007

Pursuant to Idaho Code § 72-717, Referee Alan Reed Taylor submitted the record in the above-entitled matter, together with his proposed Findings of Fact and Conclusions of Law to the members of the Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed Findings of Fact and Conclusions of Law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant did not give timely notice of his accident and his claim is barred pursuant to Idaho Code § 72-701.

2. Claimant has failed to prove that the bar to his claim posed by Idaho Code § 72-701 is averted by satisfaction of Idaho Code § 72-704.

3. Claimant's claim is dismissed.

4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this 2nd day of August, 2007.

INDUSTRIAL COMMISSION

_____/s/_____
James F. Kile, Chairman

_____/s/_____
R. D. Maynard, Commissioner

_____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on 2nd day of August, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

STARR KELSO
P O BOX 1312
COEUR D ALENE ID 83816

H JAMES MAGNUSON
P O BOX 2288
COEUR D'ALENE ID 83814

lbs _____/s/_____